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Judicial Nomination and Confirmation Process:
Hearing Before the S. Comm. on the Judiciary,
107th Cong., Sept. 4, 2001 (Statement of Mark V.
Tushnet, Prof. of Law, Geo. U. L. Center)

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THE JUDICIAL NOMINATION AND CONFIRMATION PROCESS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

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historians. He is the coauthor of, among other works, *Federal Courts in the 21st Century*, and has written extensively about the history of the Federal judiciary.

Like the other witnesses, your entire statement is read into the record and you may proceed as you wish, Professor.

**STATEMENT OF MARK TUSHNET, PROFESSOR OF LAW,
GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.**

Mr. TUSHNET. Thank you, Senator Schumer. I want to thank you and your Subcommittee for inviting me to testify on the important question we are discussing today.

I am going to begin with some general comments about whether nominees must show that they are particularly qualified for the appointment or whether, in contrast, those who oppose the nomination must show that the nominees are not qualified. My written comments turn to the relevance of political experience to appointment to the Federal courts. I won't go through those points orally, but would be happy to discuss them in the question period.

It seems to me that constitutional principle shows that nominations come to the Senate essentially in equipoise because the considerations relevant to a burden of persuasion are basically in balance. That conclusion, it seems to me, is supported by the most basic aspects of our system of separation of powers, famously described by Madison in the 51st Federal Paper as one in which ambition counters ambition; that is, the separation of powers system works best when each branch—here, the President and the Senate—take positions that each calculates independently will serve the American people best.

In the context of judicial nominations, the process of ambition countering ambition works in this way: the nominee and his or her supporters can point out that the nomination was made by a President. Now, we have heard talk about deference to the President, but the question really is what is the reason, if any, for the existence of some presumption or deference.

It is not simply the position the President occupies. Rather, deference arises, if it does, because the President presumptively has the support of the people of the United States as a whole, having been chosen by a majority of them. In response, Senators can reasonably respond that they too were chosen by the majority of the American people, taken as a whole, organized somewhat differently. Indeed, I think there are a couple of considerations that make the Senators' claims somewhat stronger, although the distribution matters a bit.

The President was chosen by a majority of the American people in a single election, capturing the people's views at a moment in time, while Senators were chosen in a series of elections that, taken together, might better capture the more enduring values of the American people. And in that connection, questions of timing may matter as well. The more remote the Presidential election is, the more powerful is the Senate's claim to represent the people as of the time of nomination.

Now, the historical record is unsurprisingly subject to varying interpretations. One historian describes the Senate's role as reactive, responding to the initiative taken by the President in selecting a

nominee. In this connection, there is a particular problem in assessing history which I would put under the heading of "divided government," a relatively recent phenomenon as a sort of permanent feature of our constitutional system.

When the Senate and the President are in the same party, it is not surprising that the Senate would engage in a relatively limited inquiry and that the criteria articulated would be relatively limited. After all, there is going to be relatively little disagreement between the nominating President and a majority of the Senate where there is this sort of unified control.

I think that Senator Schumer's concern about the under-the-table problem arises in connection with divided Government, when the President and a majority of the Senate are from different parties. It is at that point that controversy arises, and I take the effort here to be one to make sure that the nature of the controversy be brought out into the open rather than concealed by some other inquiries that might be undertaken.

This historian I quoted, Dean Raymond Solomon, describes the history as one in which politics, policy and professionalism all play a role. Policy concerns, he says, dominate when Presidents attempt to transform governmental structures or policies and perceive the Court as a necessary ally in accomplishing that agenda.

Controversy has arisen when Presidents made selections based on concerns that the Senate didn't share, whether the disagreement was over a policy course the President sought to set through the nominations or over the patronage-type politics the President pursued in selecting a nominee.

My own take on this complex history would be that, in general, opponents of nominations have never thought that the mere fact of nomination carried with it any special presumption in favor of the nomination. Nomination contests have focused on whatever seemed relevant at the time: the nominee's ideology, the nominee's performance in executive office pursuing policies with which the Senate didn't agree, whether the nomination would have particularly dramatic effects on the overall direction of the Court, the nominee's background. All of this has been fair game, and it seems to me that is precisely the way the system of ambition countering ambition should work.

I want to close with two comments. The first is the observation that has been made earlier today about the inaccuracy of predictions about the course the nominees will pursue once appointed. Here, there is a line—I may not quote it exactly—from Ecclesiastes: the race is not always to the swift, nor the battle to the strong. It was amended by either H.L. Mencken or Damon Runyon, but that is the way to bet; that is, chances are you are going to get what you expect to get.

The second point relates to the concern about an intrusive or extensive nomination process and its effects on attracting people to the positions for which they might be nominated. Here, I want to refer to a dinner conversation I had nearly 30 years ago with the first judge I worked for, George Edwards, in Detroit.

At the end of my term of service with him as a law clerk, we went out to dinner and during the course of that dinner he said something that I have never forgotten, which is, reflecting on his

career, he said we should always remember that it is a privilege to have the opportunity to serve the American people. I think that a nominee who does not regard the opportunity to serve as a real privilege is one about whom we ought to have questions.

Thank you.

[The prepared statement of Mr. Tushnet follows:]

STATEMENT OF MARK TUSHNET, CARMACK WATERHOUSE PROFESSOR OF
CONSTITUTIONAL LAW, GEORGETOWN UNIVERSITY LAW CENTER

I want to thank Senator Schumer and the subcommittee for inviting me to testify on the important question of the criteria Senators should use in determining whether to vote in favor of a proposed appointment to the federal courts, and especially the Supreme Court. My observations are informed by historical experience and, I believe, constitutional principle. I begin with some general comments about whether nominees must show that they are particularly qualified for the appointment or whether, in contrast, those who oppose the nomination must show that the nominees are not qualified.

My comments then turn to the relevance of political experience to appointment to the federal courts, and especially the Supreme Court. In my brief comments I will provide some snapshots from history, which indicate that many Supreme Court justices, including some of the most celebrated, have had substantial experience at the national political level.¹ After giving these snapshots, I will explain why I think that such experience is an important asset that a person can bring to the Supreme Court. I do not argue, of course, that only people with such experience should be appointed to the Court, but rather that the Court serves us best when it contains a mixture of people with different backgrounds, and among those backgrounds should be some with substantial national political experience.

I believe that constitutional principle shows that nominations come to the Senate essentially in equipoise, because the considerations relevant to a burden of persuasion are basically in balance. This conclusion seems to me supported by the most basic aspects of our system of separation of powers, famously described by James Madison in *The Federalist* 51 as one in which ambition counters ambition. That is, the separation of powers system works best when each branch—here, the President and the Senate—take positions that each calculates independently would serve the American people best.

In the context of judicial nominations, the process of ambition countering ambition works in this way: The nominee and his or her supporters can point out that the nomination was made by a President who presumptively has the support of the people of the United States as a whole, having been chosen by a majority of them. Senators can reasonably respond that they too were chosen by a majority of the American people taken as a whole. Indeed, they can note that the President was chosen by a majority of the American people in a single election, capturing the people's views at a moment in time, while Senators were chosen in a series of elections that, taken together, might better capture the more enduring values of the American people. In that connection, questions of timing may matter as well: The more remote the presidential election is, the more powerful is the Senate's claim to represent the people as of the time of the nomination.

The historical record is, unsurprisingly, subject to varying interpretations. One historian describes the Senate's role as "reactive," responding to the initiative taken by the President in selecting a nominee.² Presidents always have political allies in the Senate, who almost always take the position that the nominee is fully qualified for the position and that, in any event, the President's judgment that the nominee is qualified deserves some deference. Evidence taken from statements by supporters of a nomination is therefore, in my judgment, less valuable than evidence taken from statements by a nomination's opponents. In addition, the confirmation of a nominee has often been something of a foregone conclusion, which makes statements of principle on the question of confirmation something of a free shot by supporters and opponents: The supporters can structure their comments to lay the groundwork for using the confirmation as a precedent, and the opponents can dismiss those statements because they have no effect on the confirmation process.

¹My comments draw in part on Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B. U. L. REV. 747 (1992).

²Rayman L. Solomon, "Nominees, Controversial," in *THE OXFORD COMPANION TO THE SUPREME COURT* 595-96 (Kermit L. Hall ed. 1992).

These considerations lead me to conclude that the most historically informed inquiry would examine highly contested nominations, a much smaller number, of course, than all nominations. Dean Solomon describes the history as one in which "politics, policy, and professionalism" all play a role. He points out that "policy concerns dominate when presidents attempt to transform governmental structures or policies and perceive the Court as a necessary ally in accomplishing that agenda." Controversy has arisen when Presidents made selections based on concerns that the Senate did not share, whether the disagreement was over the policy course the President sought to set through the nominations or over the patronage-type politics the President pursued in selecting a nominee.³

I would summarize a complex history by saying that, in general, opponents have never thought that the mere fact of nomination carried with it any special presumption in favor of the nomination. Nomination contests have focused on whatever seemed relevant at the time. The nominee's ideology, the nominee's performance in executive office pursuing policies with which the Senate did not agree, whether the nomination would have particularly dramatic effects on the overall direction of the court, the nominee's background, whether the President is using the nomination essentially as a patronage appointment or to appeal to some particular interest group—all this has been fair game. In my view, that is precisely the way the system of ambition countering ambition should work.

I turn now to the question of political experience as a qualification for judicial office. Consider first the membership of the Supreme Court when it decided *Brown v. Board of Education*. The Chief Justice had been Governor of California, the Republican Party's candidate for the vice-presidency in 1948, and a realistic contender for the presidential nomination in 1952 until Dwight Eisenhower entered the race. Hugo Black had been a Senator and a leader in promoting some of Franklin Roosevelt's most important legislative initiatives. William O. Douglas had been a presidential adviser and chair of one of the New Deal's major administrative agencies, the Securities and Exchange Commission. Stanley Reed had been a state legislator, general counsel to an important Depression-era agency, and Solicitor General. Felix Frankfurter had been a close presidential adviser and a major public commentator on the Supreme Court and the Constitution. Robert Jackson had been Solicitor General and Attorney General. Tom Clark had been a close presidential adviser and Attorney General under Harry S. Truman. Even the least distinguished members of the *Brown* Court had significant national political experience: Harold Burton had been mayor of Cleveland and a Senator, and Sherman Minton had been a Senator from Indiana before his 1940 election defeat, after which he was appointed to the federal court of appeals.

The substantial political experience represented on the *Brown* Court was not unique, or a response to the Court's obstructionism during the early New Deal, as a second snapshot reveals. The Court in the 1920s also had several members with substantial national political experience. The Chief Justice, William Howard Taft, had of course been president of the United States. James McReynolds had been Attorney General. Louis Brandeis had been a major public figure, leading the nation's consumer movement. Joseph McKenna had been a member of the House of Representatives and, briefly, Attorney General. And George Sutherland had been a leading figure in the United States Senate, after having served in the state legislature and the House of Representatives.

A third snapshot includes the men who have served as Chief Justice. John Jay, of course, had been an important diplomat for the new nation and an author of a handful of *The Federalist Papers*. John Marshall had been a Virginia legislator, an important legal and political adviser to George Washington, a member of the House of Representatives, and, briefly, secretary of state. Roger Taney had been, again, a close adviser to President Andrew Jackson, secretary of the treasury and Attorney General. Salmon Chase was a governor and Senator, and Lincoln's secretary of the treasury, and, even while serving on the Court, a persistent potential candidate for the presidency. Edward Douglass White served in the Senate for three years before his appointment as Chief Justice. I have already mentioned William Howard Taft. Taft's successor Charles Evans Hughes had been Governor of New York for two terms before his appointment to the Court, and was the unsuccessful Republican candidate for the presidency in 1916. Before his reappointment as Chief Justice, Hughes served as secretary of state. Fred Vinson was a member of the House of Representatives, and, after resigning as a federal judge, occupied a number of im-

³For example, the Senate rejected the nomination of Ebenezer Hoar to the Supreme Court in 1879 because the President represented one segment of the Republican Party, to which Hoar adhered as well, while the majority of the Senate formed a different faction in the same party and sought a nominee from that faction.

portant positions in Roosevelt's wartime administration before becoming secretary of the treasury in 1945.

My final snapshot is drawn from a list of justices provided in the first pages of the constitutional law casebook of which I am a co-author. The list is designed, we say, "to offer at least some sense of the background, personality, and intellectual style of the justices who have had the greatest impact on modern constitutional law."⁴ Omitting the Court's present members, we describe 29 justices, of whom seventeen, in my judgment, had substantial political experience, almost all of them on the national level.

I should note at this point an important qualification. Of course determining whether someone has had substantial political experience on the national level is a matter of judgment, and I have no doubt that some of my judgments could be challenged. In my efforts to count and evaluate, for example, I treat Louis Brandeis and Thurgood Marshall as people with substantial national political experience even though neither had occupied elective office before they became justices, and Brandeis had not held even an appointive national office. But I did not include Lewis Powell in my list of justices with substantial national political experience, despite the important positions he held in Virginia's education system during the early years of desegregation and despite the fact that he had been president of the American Bar Association. I counted serving, even briefly, as Attorney General as having national political experience, but what of Justice Byron White's service as Deputy Attorney General?

The snapshots I have given indicate rather clearly, I think, that over the course of U.S. history, substantial experience in national politics has been regarded as an asset for Supreme Court justices. This is not to say that such experience has been a prerequisite for appointment, or that justices with such experience have uniformly been better, according to any relevant criteria, than justices without it. Rather, it is to say only that the judgment of presidents and Senators appears to be that having a Court with some justices with national political experience is valuable for the Court and the nation.

What might explain that judgment? I will identify three reasons, in decreasing order of importance, for thinking that the Supreme Court's quality, and therefore the quality of constitutional law, is improved when some justices have had significant national political experience. Again, of course, one's view about the quality of constitutional adjudication depends at least in part on the general understanding one has about what constitutional adjudication is, and each Senator will have to assess what I have to say in light of his or her individual understanding about that question.

The most important reason for thinking that substantial national political experience is a valuable attribute of Supreme Court justices is that an important component of what we want from Supreme Court justices is what Dean Anthony Kronman of Yale Law School calls prudence or practical wisdom, precisely because justices are called upon not to articulate principles of justice in the abstract but rather to develop principles of justice suitable for regulating government in the present day, under real-world conditions.

We can find practical wisdom in many places, of course, but people with substantial national political experience have two characteristics that make them particularly suitable candidates for finding it. First, they have displayed their capacity to exercise practical wisdom in their public lives. So, we simply have a larger evidentiary base for evaluating a nominee's capacity to exercise practical wisdom when the nominee has been an important public figure. No doubt backroom advisers and lawyers in private practice can have practical wisdom, but only those whom they advise will be able to say with confidence that the nominees are indeed people of sound practical judgment.

Second, an important reason that people become successful public figures over the long run is that they actually demonstrate their good judgment. Among other things, success requires that political figures listen well to people with views different from theirs, and learn how to respect and to some degree accommodate those views without yielding on what is fundamental to the political actor. Here substantial national political experience does not itself give the person a particular asset, such as knowledge about the realities of government that he or she can contribute to the Court. Rather, successful performance on the national political stage is an indication that the nominee has the valuable character trait of practical wisdom and judgment that we seek in judges.

A somewhat less important reason for thinking that national political experience should be regarded as an asset in a judicial nominee is the sense of reality that peo-

⁴ GEOFFREY STONE ET AL., *CONSTITUTIONAL LAW* lxxi (4th ed. 2001).

ple with such experience can bring to constitutional adjudication. To the extent that Supreme Court justices are developing doctrine aimed at ensuring that the American people are governed as well as we can be within constitutional limits, knowing how government actually works may be a valuable asset. The usual example given to support this point is that someone sensitive to the realities of the national legislative process would not dismiss legislative history as a guide to interpreting statutes.⁵ Another example might be that of Justice Byron White, the Court's most articulate defender of the proposition that separation-of-powers questions should be resolved with an appreciation of the way in which members of Congress and members of the executive branch are engaged in long-term interactions. Justice White based this understanding of the Constitution on his experience as Deputy Attorney General.

I think it is indeed important that the Supreme Court as an institution have access to this sense of the realities of governing. One problem, however, is that those realities change, and a person appointed in one era might not understand the new realities. Justice Black, for example, clearly knew what Congress was like in the late 1930s, but he served through the 1960s, by which time the realities of the legislative process had changed dramatically. He could, and did, contribute his sense of the realities of governance to the Court in the 1940s, but his ability to make such a contribution dissipated over time. This consideration suggests to me that Senators should be concerned that they be presented with some regularity with nominees with substantial national political experience. A long run of nominees without such experience is, I think, likely to impair the quality of constitutional law.

Finally, in conversations about the contributions people with substantial political experience can make to constitutional adjudication, sometimes I have heard politicians disparaged as people who are good at the art of compromise but—for that reason—not well suited for developing constitutional principles. Designing a statute that accommodates competing interests, it is thought, is quite different from articulating a constitutional principle to regulate some general area like free speech. In the main, I agree with this position, although I think it fails to appreciate the extent to which politicians themselves act on principle. Still, I think it worth noting that the art of compromise is not foreign to the Supreme Court. As with statutes, opinions contain language whose terms are sometimes negotiated among the justices, as the inspection of the papers of various justices at the Library of Congress reveals. A person adept of explaining to a recalcitrant colleague why a change in language is desirable and need not impair what the colleague thinks important serves a valuable function on the Court. To the extent that people with substantial political experience bring such talents to the job, all the better. But, of course, those talents are not unique to people with such experience, so the ability to work out compromises over doctrinal formulations is the least important asset people with substantial national political experience bring to the Court.

I should be clear that neither my snapshots nor my normative argument establish that we should have only people with substantial national political experience on the courts. For example, having some grasp of the realities of government is useful, but so is having some grasp of the realities of business, and having some grasp of the realities of the criminal justice system, and so on. Different nominees bring different experiences to the courts, and what seems desirable is having a decent mix of people, among whom are some with substantial political experience.⁶

To summarize: Historically it has been thought important that some significant number of Supreme Court justices have substantial experience in national politics. And there are good reasons, based on what I think is the best understanding of what we seek in constitutional adjudication, supporting that judgment. In particular, judges with such experience are likely to bring a sense of reality to constitutional adjudication, and, more important, practical wisdom as well.

Chairman SCHUMER. Thank you, Professor. I want to thank all five witnesses. The testimony was varied, but I think right to the point, and we appreciate it very much.

⁵ I note, though, that to some extent those who argue against resort to legislative history have an account of statutory meaning based on a theory of democratic self-governance according to which the actual operation of the present legislative process is irrelevant.

⁶ I think it worth noting as well one disadvantage associated with the nomination of people with substantial national political experience: The Senators who will consider them in the confirmation process are likely to have had personal relations with the nominees. Such relations can enhance the quality of the Senators' judgments, but they also can distort those judgments: nominee who has been easy to get along with may mistakenly be seen as wise and prudent.